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NO.

IN THE

Supreme Court of the United States

October Term, 1989

GWENDOLYN BROWN,

Petitioner,

vs.

JAMES G. LEDBETTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Volume 1 of 2
Petition for Certiorari

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QUESTIONS PRESENTED

I. Whether the Petitioner, an indigent single parent, has enforceable rights to receive the paternity establishment and child support recovery services required to be provided by the State of Georgia under Titles IV-A and IV-D of the Social Security Act, 42 U.S.C. §§ 601 et seq., and 651 et seq., so as to be able to state a claim under 42 U.S.C. § 1983.

II. Whether the Petitioner has stated a claim under the United States Constitution for deprivation of property without due process, in the failure of the State of Georgia to enforce the child support obligation she was required to assign to it, which may be brought under 42 U.S.C. § 1983.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Gwendolyn Brown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on June 27, 1989. Rehearing and rehearing in banc were denied on September 26, 1989. The writ should issue, pursuant to Supreme Court Rule 17.1(a) and (c), because the

Court of Appeals has decided that the petitioner may not seek redress from the deprivation of important federal rights by a state actor in an action under 42 U.S.C. § 1983. The Court of Appeals' holding confuses the rulings of this Court regarding the enforceability of federal statutory rights under § 1983 with those regarding the implication of private rights of action from federal statutes.

The Circuit Court's holding also conflicts with the precedents of this Court in Maine v. Thiboutot, 448 U.S. 1 (1980) and Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987).

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were as follows:

Plaintiffs: JOY D. WEHUNT, GWENDOLYN BROWN, BRENDA WHITE

Defendants: JAMES LEDBETTER, in his capacity as Commissioner of the Georgia

Department of Human Resources

MARGARET M. HECKLER, in her capacity as Secretary of the United States Department of Health and Human Services; replaced by OTIS R. BOWEN; currently LOUIS W. SULLIVAN

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Shifting Hardships For Low-Income Housing Residents: Wright v. City of Roanoke Redevelopment and Housing Authority, 35 Wayne L. Rev. 169 (1988) 16

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989). Plaintiffs' petition for rehearing and rehearing in banc was denied by the court without opinion on September 26, 1989, and is reported at 888 F.2d 1398.

The district court's orders on the defendants' motions to dismiss under FED. R. CIV. P. 12(b)(6) were entered on October 1, 1986 and March 11, 1987. These orders are unreported but are included, along with the opinion and orders of the Court of Appeals for the Eleventh Circuit, in the Appendix.

JURISDICTION

The judgment of the Eleventh Circuit United States Court of Appeals was entered on June 27, 1989, and the order denying plaintiffs' petition for rehearing and

rehearing in banc was entered on September 26, 1989. This Petition for a Writ of Certiorari is filed within ninety days of the Court of Appeals' denial of the petition for rehearing and rehearing in banc. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution (in relevant part):

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The following matters are lengthy, and are set out in the appendix in accordance with Supreme Court Rule 21.1(f).

42 U.S.C. § 602(a)(26)

42 U.S.C. § 602(a)(8)(A)(vi)

42 U.S.C. § 602(a)(28)

42 U.S.C. § 651

42 U.S.C. § 654(4)

42 U.S.C. § 657(b)(1); -(c)

STATEMENT OF THE CASE

Petitioner Gwendolyn Brown, and her co-plaintiffs below, Joy Wehunt and Brenda White, are indigent single parents who intermittently received cash assistance under the Aid to Families with Dependent Children ("AFDC") program in Georgia for several years. As a condition for receipt of AFDC benefits, they assigned to the State their rights to receive child support for their children. The plaintiffs persistently sought help in collecting child support and in establishing the paternity of certain of their children; Petitioner Brown in particular sought help to collect child support for two of her children, and in establishing paternity and a child support obligation for a third. Nonetheless, the State Office of Child Support Recovery ("OCSR") did nothing for them. Wehunt, 875 F.2d at 1561-2.

States such as Georgia, which partici-

pate in the AFDC program, must develop a plan for delivery of benefits and services which meets dozens of detailed standards set out at 42 U.S.C. §§ 602(a)(1)-(40) of the Social Security Act. ("Title IV-A") 42 U.S.C. § 602 (a)(27), in turn, requires that an AFDC plan include a plan for the delivery of child support recovery and paternity establishment services meeting criteria set out in 42 U.S.C. §§ 651 et seq. ("Title IV-D") The core of the statutory scheme is 42 U.S.C. § 654(4) which mandates that the state undertake to establish paternity and to enforce child support obligations for all AFDC children except where it is in the best interests of a given child not to do so.

The statute details the components of the required service delivery plan. That plan must be reviewed and approved by the Secretary of the U.S. Department of Health and Human Services ("Secretary") pursuant

to 42 U.S.C. § 652(a)(3).

As the statute itself declares, its child support and paternity establishment program seeks to:

> enforc[e] the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locat[e] absent parents, establish[] paternity, obtain[] child and spousal support, and assur[e] that assistance will be available under this part to all children (whether or not eligible for [AFDC]) for whom such assistance is requested.

42 U.S.C. § 651.

In regard to AFDC recipients, these objectives are accomplished in part through the state's undertakings "to secure support for such child" and, in addition, for those born out of wedlock, "to establish the paternity of such child". 42 U.S.C. § 654(4). The fulfillment of these obligations is meant to be accomplished by the specific services that the statute and regulations require the state to provide to persons such as the petitioner.

The statute also creates a specific financial stake on the part of its intended beneficiaries like the Petitioner, apart from the collection of child support itself. While as a general rule any income received by an AFDC family reduces its grant dollar-for-dollar, in the case of child support collected by the state, the first $50.00 must be remitted to the AFDC family, in addition to the AFDC grant to which it would otherwise be entitled. 42 U.S.C. §§ 602(A)(8)(a)(vi); 657(b)(1). Furthermore, in Georgia, which is a so-called "fill-the-gap" state, the family is entitled to receive any child support collections which fill the gap between the state's "payment standard" and its "standard of need", an amount which can be as high as $141, or 34% of its monthly income, for a family of three persons without other income. 42 U.S.C. § 602(a)(28). See generally, Quarles v. St. Clair, 711 F.2d 691

(5th Cir. 1983). The grant paid to an AFDC family is reduced only when support recoveries exceed the State's standard of need for a specific month.

In addition, the State is required to continue child support recovery services for families who have left the AFDC program. Current monthly child support collections are remitted to the family once AFDC terminates. 42 U.S.C. § 657(c). Failure to adopt and implement a plan for child support recovery and paternity establishment can result in loss of federal funds for the entire AFDC program. Breach of an approved plan can lead to escalating fiscal penalties. 42 U.S.C. § 603(h).

Just how serious Congress is about the mandatory nature of the program, and the importance of the services the statute requires, is illustrated by the fact that many of the criteria require participating states to yield to the federal will on

important matters of traditional state prerogative; 42 U.S.C. § 666(a), for example, contemplates mandatory wage withholding of child support payments, expedited judicial proceedings, and interception of state income tax refunds.

The Secretary has further detailed the statutory mandate in extensive regulations at 45 C.F.R. Parts 301-305.

Joy D. Wehunt brought this action on May 9, 1985, under 42 U.S.C. § 1983, asserting jurisdiction under 28 U.S.C. § 1331, against James Ledbetter, Commissioner of the Georgia Department of Human Resources ("Respondent"), who operates the OCSR, seeking injunctive and declaratory relief from his failure to assure that she received adequate and timely child support recovery and paternity establishment services to which Titles IV-A and IV-D entitle her. She also asserted a due process violation based on the State's accepting as-

signment of her child support rights and its subsequent failure to enforce them. Ms. Wehunt sued on behalf of herself and all others similarly situated. Brenda White and Petitioner Brown subsequently intervened and sought to be class representatives.

Following the filing of her lawsuit, Ms. Wehunt did begin receiving child support, and she is no longer a party to this action. At the time of the district court's dismissal of the case, Petitioner Brown had yet to receive any services from the child support recovery or paternity establishment program operated by the Respondent. Wehunt v. Ledbetter, 875 F.2d 1558, 1561.

The district court found that the plaintiffs had no rights under Titles IV-A and IV-D which could be enforced under 42 U.S.C. § 1983. The plaintiffs' motion for class certification was denied by the dis-

trict court as moot when it granted the defendants' motions to dismiss.

A panel of the Eleventh Circuit Court of Appeals affirmed the judgment of the district court, in a 2-1 per curiam decision issued June 27, 1989. Using the analysis established in Cort v. Ash, 422 U.S. 66 (1975), the panel majority held that Titles IV-A and IV-D had been enacted for the "especial benefit" of "society as a whole", conferring on the petitioner no "rights...secured by the...laws" within the meaning of 42 U.S.C. § 1983. Wehunt, 875 F.2d at 1565-6. Judge Clark, in his dissent, found the Cort v. Ash test to be inapplicable, and would have held that Petitioner Brown had enforceable rights under 42 U.S.C. § 1983.

The issues in this Petition are therefore whether Ms. Brown may state a claim under 42 U.S.C. § 1983 against the Respondent Ledbetter for his failures (1) to

operate an effective child support recovery and paternity establishment program as required by Titles IV-A and IV-D of the Social Security Act, of which she is the intended beneficiary, or (2) to take action to enforce her rights to child support, assigned to the State, resulting in a deprivation of her property without due process under the Fourteenth Amendment.[1/]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD RESOLVE THE CONFUSION REFLECTED IN THE ELEVENTH CIRCUIT'S RELIANCE ON CORT V. ASH TO DETERMINE THE EXISTENCE OF A "RIGHT...SECURED BY THE...LAWS" WITHIN THE MEANING OF 42 U.S.C. § 1983.

1/ The plaintiffs also asserted a claim against the Secretary under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), for his failure to comply with his duties to monitor and initiate corrective actions to assure that the Respondent operates an effective child support recovery program. The panel majority's decision, finding plaintiffs had no standing to assert a claim under the APA against the Secretary, is not at issue in this Petition.

A. The Opinions In Wright v. City Of Roanoke Redevelopment and Housing Authority Did Not Adequately Define The Relationship Between Maine v. Thiboutot and Cort v. Ash.

> When should a person injured by a violation of federal law be allowed a remedy in a federal court? This seemingly simple question continues to present...more difficulty than most substantive questions...

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 22-23 (1981) ("Sea Clammers") (Stevens, J., partial dissenting opinion). A substantial, and important, share of this continuing difficulty arises because of the as yet unmet need to define the relationship between the principles of Maine v. Thiboutot, 448 U.S. 1 (1980) ("Thiboutot") and Cort v. Ash, 422 U.S. 66 (1975) ("Cort").

In Thiboutot, the Court held that in the context of federal statutes, Section 1983 provides a private remedy for any deprivation of any "rights...secured by

the...laws". The Court subsequently placed two limitations on Thiboutot: if no "rights" were created in the federal statute for the benefit of the plaintiff, Section 1983 is unavailable, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) ("Pennhurst"); or if Congress has created an alternative remedy, Section 1983 is unavailable. Smith v. Robinson, 468 U.S. 992 (1984); Sea Clammers, supra.

In Cort v. Ash, 422 U.S. 66 (1975), the Court established an analysis for determining when a cause of action could be implied from an otherwise silent federal statute. The Cort analysis is necessary for actions between private parties, when the "state action" required under Section 1983 is not at issue. The inquiry in an implied cause of action case involves not only whether there are enforceable rights in the statute at issue, but also whether the implication of a remedy is appropriate.

By contrast, where federal rights are being abridged by state actors, Congressional intent to provide a remedy is solidly manifested in Section 1983, and the Cort analysis is inapt.

In Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987) ("Wright"), this Court faced the application of Thiboutot and Cort by the Fourth Circuit to a claim by public housing tenants under Section 1983 that their rights under federal statutes to pay limited rents, including utility allowances, had been abridged by their housing authority. In asking this Court's aid, plaintiff-petitioners in Wright expressly argued that the Court of Appeals had confounded the two lines of cases, so as to reduce 42 U.S.C. § 1983 to a dead letter as a remedy for violations of federal statutes. Petition for Writ of Certiorari at 9-11, Wright (No. 85-5915). This Court was subsequently briefed

on the conflicting views on the subject which had by then emerged from various courts and commentators. Brief of Petitioner at 27 - 30, Wright (No. 85-5915).

This Court's ultimate decision in Wright, however, neither joined nor settled the issue. Instead, the five member majority opinion and the four member minority opinion took pointedly separate analytical tracks: the majority relied on Thiboutot and did not cite Cort; the minority relied on Cort and did not cite Thiboutot.[2/] The

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2/ That this unusual result may have been confusing is seen in the following pronouncement in the first published law review commentary on Wright:

> The court engaged in judicial legislation when it applied Thiboutot to the evaluation of a section 1983 violation rather than applying the traditional Cort v. Ash standard to determine whether an implied cause of action existed. This activity by the Wright Court fundamentally violated the separation of powers doctrine.

Shifting Hardships For Low-Income Housing Residents: Wright v. City of Roanoke Redevelopment and Housing Authority, 35 Wayne L. Rev. 169, 185 (1988).

majority concluded that the mandatory statutory provisions concerning limitations on rent, together with the statute's interpretation by regulation, created rights enforceable by tenants.

Other than Pennhurst and Wright, which established that "rights" must be founded on mandatory, rather than precatory, legislative provisions, this Court has not taken the opportunity to indicate in more detail how rights enforceable under Section 1983 are to be identified.[3/]

3/ The importance to this Court of the matter of when rights are enforceable under Section 1983 may be indicated by the grant of certiorari on Question One ("Does Medicaid provider have private federal cause of action under 42 U.S.C. § 1983 to enforce Medicaid Act against state?"), in Baliles v. Virginia Hospital Association, No. 88-2043, 10-2-89, 58 L.W. 3021. See also, Coos Bay Care Center v. Oregon, 803 F.2d 1060 (9th Cir. 1986), cert. granted, 481 U.S. 1036, vacated as moot, ___ U.S. ___, 108 S.Ct. 52 (1987), which raised similar issues. Likewise, certiorari should be granted in this case to assure consistency between Baliles and the instant case.

B. The Lower Courts Are Confused About The Appropriate Analysis For Evaluating Rights Alleged To Arise From Federal Statutes.

In Wright's wake, the Courts of Appeals have continued to take a troubling variety of approaches to the issue of assessing when "rights" are created by federal statutes which may be enforced under Section 1983. In the instant case, the Eleventh Circuit Court of Appeals, citing Cort, concluded that petitioner was not a rights holder under the child support and paternity establishment program of Titles IV-A and IV-D of the Social Security Act, even though as a potential beneficiary she would stand to receive a wide array of valuable and important services to assist her in establishing the paternity of her child, and in collecting child support, were the Respondent to comply with the federal statutory and regulatory requirements.

By contrast, other courts have readily proceeded to enforce the Titles IV-A and IV-D mandates in actions brought by beneficiaries of child support and paternity establishment services under Section 1983. Bennett v. White, 865 F.2d 1395 (3d Cir.), cert. denied on other grounds, ___ U.S. ___, 109 S.Ct. 3247 (1989); Quarles v. St. Clair, 711 F.2d 691 (5th Cir. 1983); Vanscoter v. Bowen, 706 F. Supp. 1432 (W.D.Wa. 1988), pending on appeal, No. ____; Beasley v. Harris, 671 F. Supp. 911 (D.Conn. 1987).

The divergence has not been confined to cases under Titles IV-A and IV-D. The Ninth Circuit, for instance, citing Cort, found that bridge users were rights holders under a requirement that bridges built with federal grant funds be toll free, so as to enable them to sue under Section 1983. Clallam County v. Department of Transportation of the State of Washington, 849 F.2d 424 (9th Cir. 1988), cert. denied, ___ U.S.

___, 109 S.Ct. 790 (1989).

In West Virginia University Hospital v. Casey, 885 F.2d 11, 19 n.1 (3d Cir. 1989), the court rejected use of the Cort analysis in a Section 1983 case, although it suggested that the Cort and Section 1983 analyses intersect on the issue of determining the existence of a "right", the first of four factors considered under Cort.[4/] In holding that the plaintiff hospital had rights arising from federal Medicaid statutes enforceable under Section 1983, the court looked to the mandatory language of the statute, contrasting it with that in Pennhurst.

On the other side, after undertaking an exhaustive post-Wright analysis of the Thiboutot/Cort lines of cases, the Court of Appeals for the District of Columbia found

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4/ The court noted, however, that the Section 1983 test is generally "more favorable" than the Cort analysis to the plaintiff seeking to enforce a federal statutory right.

no enforceable rights conferred on public housing tenants by a section of the United States Housing Act. Edwards v. District of Columbia, 821 F.2d 651 (D.C.Cir. 1987). A divided court recognized that under this Court's decisions enforceable rights are more easily found under Section 1983 cases than under the Cort analysis. Even so, somewhat differently reasoned opinions by two of the three judges concluded that under 42 U.S.C. § 1437p, public housing tenants had no rights to challenge the "constructive demolition" of a public housing project. Significantly, Congress found the court's result plainly wrong, moved swiftly to declare it so, and enacted clarifying legislation. H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess., reprinted in 1987 U.S. CODE CONG. ADMIN. NEWS 3317, 3469. See also, Vantage Healthcare Corp. v. Virginia Bd. of Med. Assiss., 684 F.Supp. 1329, 1331 (E.D.Va. 1988), pending

on appeal, No. 88-3872 (finding no rights enforceable by providers of Medicaid services, relying on Cort).

Allandale Neighborhood Association v. Austin Transportation Study Policy Advisory Committee, 840 F.2d 258 (5th Cir. 1988), though not precisely on point, nonetheless reveals a Court of Appeals viewpoint which could benefit from greater clarity by this Court about the relationship between the implied cause of action cases and those under Section 1983. Plaintiffs sought a private remedy against the defendant, a metropolitan planning agency appointed by the Governor of Texas under a federal highway planning statute. The court noted that if the agency were a state body, the claim might fall within the scope of Section 1983. Relying on the fact that plaintiffs had not made that contention, the court claimed discretion whether to decide the point, then declined to do so.

Next, the Allendale court conducted an extended analysis of whether there was an implied cause of action, including a search for "any indication of legislative intent, explicit or implicit, either to create...a remedy or deny one." 840 F.2d at 258, quoting Cort, 422 U.S. at 78. If, however, that search was one for Congress' intent for dealing with the type of case presented on the record before them, it made little sense for the Allandale panel to decline to consider whether Congress had provided that answer in Section 1983 itself. Thus, it may well be that the Allandale court did not exercise its best judgment in affirming the dismissal of a complaint without deciding whether the allegations therein were sufficient to support an action under Section 1983.

The confusion which arose between Cort and Thiboutot still mounts; Pennhurst, Sea Clammers, and Wright have failed to provide

adequate guidance to lower courts evaluating claims of statutory rights enforceable under Section 1983. This needs further clarification by this Court.

C. Actions Of The Circuit Courts Leave Congress With No Clear Idea How To Create Rights Enforceable Under Section 1983.

Congress must legislate against the backdrop of interpretation by this Court and the lower courts as to how to accomplish its aims. The early case law following Thiboutot reflected a more hospitable analysis under Section 1983 and the historical importance of that remedy in the protection of federally-created rights. See, Samuels v. D.C., 770 F.2d 184, 194 n.7 (D.C.Cir. 1985). Courts then routinely entertained challenges to state-run federal

benefits programs under Section 1983.[5]

The more recent application of the Cort stricter standard to Section 1983 actions, however, has eroded that jurisprudence and gives far less reliable guidance to Congress -- to the point where that body looking at the case law can have no clear idea what it must do to preserve the Section 1983 remedy for federal rights holders injured by state actors.[6]

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[5] Gonzalez v. Pingree, 821 F.2d 1526 (11th Cir. 1987) (Food Stamp program); Coos Bay Care Center, supra (Medicaid program); Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983) (Title IV-E of the Social Security Act); Crawford v. Janklow, 710 F.2d 1321 (8th Cir. 1983) (low income home energy assistance program). See also, Baliles v. Virginia Hospital Association, 868 F.2d 653 (4th Cir.), cert. granted, No. 88-2043, (Oct. 2, 1989), 58 L.W. 3021 (Medicaid program).

[6] Furthermore, uncertainty about statutory Section 1983 actions is likely to be exacerbated by recent developments in the Court's jurisprudence. First, there is the movement toward a more committed "textualism", exemplified by Justice Scalia's statements in Green v. Bock Laundry Mach. Co., ___ U.S. ___, 109 S.Ct. 1981 (1989).

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The implied cause of action jurisprudence under Cort is simply inappropriate for Section 1983 cases. The Cort criteria tend to constrain and distort the proper scope of rights which should be enforceable under Section 1983. Particularly in view of this Court's acknowledgement that "'[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right," Wright, 479 U.S. at 423, quoting Smith v. Robinson, 468 U.S. at 1012, the confusion of circuit courts between the Thiboutot line of cases with

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6/ (continued from previous page) Next is the suggestion, also advanced by Justice Scalia and earlier advanced by Justice Powell, that the Court should cease altogether to recognize implied causes of action. See Thompson v. Thompson, 484 U.S. 174, 188 (1988) (concurring opinion). Finally, there has been the recent use of Section 1983's remedy for "rights...secured by the...laws to defeat, rather than to advance, a cause of action pursuant to a substantive civil rights statute. Jett v. Dallas Independent School Dist., ___ U.S. ___, 109 S.Ct. 2702 (1989).

those following Cort, continues to threaten the viability of Section 1983 as a remedy, just as the plaintiff-petitioners in Wright warned. This should be remedied.

II. THIS COURT SHOULD DECLARE THAT THE CORT ANALYSIS IS INAPPROPRIATE FOR RIGHTS CLAIMED TO BE ENFORCEABLE UNDER SECTION 1983.

A. The "Especial Benefit" Test From Cort Is Too Narrow To Be Used In Section 1983 Cases.

Like analysis under Section 1983, analysis under Cort begins with a search for a "right" created by the federal statute in question. Under Cort, the existence of the right is tested by asking whether the plaintiff is one of the class for whose "especial benefit" the statute was enacted. Cort, 422 U.S. at 78, quoting Texas & Pacific Railway Company v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis added in Cort). The emphasis on the word "especial" invites the exclusion of those who are merely "beneficiaries", but who are not "especial bene-

ficiaries". In a Section 1983 case, the invitation to find the "especial" beneficiary, to the exclusion of other bona fide beneficiaries, should be refused. Instead, the receipt of real and appreciable benefits pursuant to the mandate of a statutory text should always be taken as a condition sufficient to establish a "right...secured by the...laws" under Section 1983.

B. Application Of The Remaining Cort Criteria Further Distorts Proper Analysis Under Section 1983.

Circuit court confusion of Thiboutot and Cort has not stopped with the identification of rights. Some have endeavored to apply other Cort factors in Section 1983 cases. Although the Court of Appeals in the instant case did not go so far, the other cases illustrate the inappropriateness of the other factors in the Section 1983 context as well.

Section 1983 is its own clear statement of an intent to provide a remedy for

violation of a "right...secured by the...laws"; to look for other evidence of Congressional intent to favor a remedy is needless. Sea Clammers shows that Congress may foreclose the Section 1983 remedy in certain cases.7/ On the other side, in implied cause of action cases, the second of the four Cort factors, examining evidence of Congressional intent to provide or to deny a private remedy, is now held to be the key inquiry. See, e.g., Merrill Dow Pharmaceuticals, Inc., v. Thompson, 478 U.S. 804, 812 n.9 (1986). This element of the Cort analysis, however, is significant-

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7/ The manner in which the Court of Appeals disposed of the instant case meant that it did not have consider the question of preclusion under Sea Clammers. Judge Clark, in dissent, would have held against preclusion. Wehunt, 875 F.2d at 1575-76.

Should it decide to grant the petition for certiorari, this Court may wish to direct that this question be addressed in briefing and argument. Alternatively, the matter could be determined on remand, should the Court of Appeals decision be ultimately reversed.

ly different from the foreclosure inquiry in a Section 1983 case.

Furthermore, once a "right...secured by the...laws" has been identified, and it has also been determined that Congress has not foreclosed the remedy, the analysis under Section 1983 is at an end. If Congress has created the "right" and not foreclosed Section 1983's remedy, there is no point in asking either of the two additional questions addressed in a Cort analysis. Congress' "right" and "remedy" answer any legitimate question of consistency with the underlying purposes of the legislative scheme (the third Cort factor). Similarly, Congress' choices of "right" and "remedy", assuming their own constitutionality, override the judicial concern with federal-state relations issues reflected in fourth and final Cort factor. Thus, analyzing a Section 1983 case under either the third or the fourth factor would also simply invite

error.

In summary, this Court should grant certiorari in this case to clarify that the Cort analysis is wholly inappropriate in the context of a Section 1983 claim founded on federal statutory rights.

C. This Case Is An Excellent Opportunity For This Court To Articulate The Proper Section 1983 Analysis.

1. Petitioner Has Rights Under Titles IV-A and IV-D of the Social Security Act.

The Eleventh Circuit Court of Appeals held that the Petitioner Gwendolyn Brown had no "rights...secured by the...laws", the deprivation of which could be redressed under Section 1983. Specifically, the Court found that Petitioner, an AFDC recipient, did not have the "right" to receive the child support and paternity establishment services which Titles IV-A and IV-D mandate that states participating in the AFDC program furnish to AFDC recipients. Significantly, Petitioner never claimed a

right to receive child support or a paternity determination itself; rather, she claimed an entitlement to the program of services which the state must provide once it decides to participate in the AFDC program and accepts federal dollars therefor.

Congress and the Secretary have spelled out in precise language both the specific duties to which Titles IV-A and IV-D hold a state, that is, the specific services which must be provided to those such as Petitioner, and the mechanism providing for the administration of specific sanctions for breach of those duties. Specific duties and sanctions prove a mandatory legislative scheme, not one which is merely precatory; and the availability of the Section 1983 remedy is wholly consistent with this Court's analysis in Pennhurst. Moreover, under Wright, these conditions are sufficient to confer rights on Petitioner. The Eleventh Circuit, however,

has stripped her of any remedy for enforcing those important and valuable rights.

2. The Court Of Appeals' Application Of The "Especial Benefit" Test In This Case Led To An Absurd Result.

Though the Petitioner plainly is within the class of persons granted real benefits by Titles IV-A and IV-D, the court ignored her, and ignored the specific duties and specific benefits created in the statutory text, the factors which were sufficient in Wright to create enforceable rights. Instead, the court searched for the "class of persons for whose especial benefit the statute was enacted". Wehunt, 875 F.2d at 1564, quoting Cort. Seizing on two excerpts from an extensive legislative history 8/, the court reached a conclusion

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8/ Even in the key passage on which it purported to rely, however, the panel majority missed Congress' own comparison of immediate and ultimate purposes:

> The immediate result [of Title IV-D] will be a lower welfare cost to the

(FOOTNOTE CONTINUED ON NEXT PAGE)

-- the likes of which no federal court considering a piece of federal legislation could ever deny -- that Congress acted with the intent to benefit society as a whole. This produced a truism and an absurdity: "Title IV-D will benefit the general public". 875 F. 2d at 1563.

No search for a more remote, but more intended, beneficiary should exclude recourse to law by those persons to whom statutory language itself grants some tangible advantage. In Wright, for instance, tenants were found to have enforceable rights, notwithstanding an overall legisla-

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8/ (continued from previous page) taxpayer but, more importantly, as an effective system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S. Rep. No. 1356, 93rd Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8146 (emphasis added). See, generally, Wehunt, 875 F.2d at 1565 (majority opinion), 875 F.2d at 1573 (dissenting opinion by Judge Clark).

tive goal that public housing should clear slum blight. The Cort test applied by the Eleventh Circuit, here, however, produces an outcome which obliterates any meaning of the term "beneficiary" altogether. Moreover, it deprives Petitioner of any means by which to assure that she has access to the critically important program of child support and paternity establishment services which Congress created for her.

This mode of analysis threatens to remove vast areas of federal statutory rights from the reach of the Section 1983 remedy. All acts of Congress, especially in the social welfare area, can fairly be said to, in the words of the Court of Appeals, "benefit[] society as a whole rather than specific individuals". For example, the Social Security laws -- the laws on which both the instant action and Thiboutot itself were based -- serve the broadest of public purposes through services delivered

to millions of individuals like the Petitioner. The opinion below portends that many of them, including the Petitioner and her class, have no "right" to receive the very specific services and benefits which these laws provide, contrary to dozens of this Court's holdings. So important a question needs to be addressed by this Court.

III. THIS COURT SHOULD HOLD THAT THE LOWER COURTS ERRED IN DISMISSING, WITHOUT FIRST ADDRESSING, PETITIONER'S CLAIM THAT SHE WAS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS WHEN THE STATE FAILED TO TAKE ACTION TO ENFORCE THE RIGHTS TO CHILD SUPPORT WHICH SHE HAD ASSIGNED TO IT.

In her complaint, Petitioner asserted that the Respondent's acts and omissions in administering the child support program violated her right to property secured by the due process clause of the Fourteenth Amendment. Specifically, she alleged that she was deprived of an economic benefit to which the act entitled her: the amount of

child support collections which, having been assigned from Petitioner to the Respondent, should be returned to Petitioner by operation of 42 U.S.C. §§ 602(a)(3)(A)(vi), 602(a)(28), and §657(b)(1). Neither the district court nor the Court of Appeals addressed this issue, although Petitioner briefed the issue at both levels. Although not the result of deliberation, the Court of Appeals' disposition of this issue is in conflict with the decision in Bennett v. White, 865 F.2d 1408 (3d Cir.), cert. denied on other grounds, ___ U.S. ___, 109 S.Ct. 3247 (1989), which assumed the availability of a Section 1983 remedy for a similar due process challenge to a state's failure to pay to families the share of collected support payments to which Titles IV-A and IV-D entitle them.

Accordingly, this Court should grant certiorari on this constitutional issue as well as the statutory issue argued above,

and thus preserve Petitioner's opportunity to pursue that issue. Petitioner recognizes that, as an alternative to resolving the constitutional issue in this Court, it may be preferable that the issue be first addressed by the Court of Appeals or the district court. This may be particularly appropriate in that, if Petitioner is successful in certain particulars of her statutory claim, the Fourteenth Amendment issue is likely to be avoidable.

CONCLUSION

This Court should grant certiorari to remedy the mounting confusion among lower courts regarding the proper analysis for determining when a plaintiff has a right arising from a federal statute enforceable under Section 1983. The Court should expressly hold that the Cort analysis is inappropriate in such instances. Finally, the Court should hold that the intended receipt of real and appreciable benefits

pursuant to the direction of a statutory text should always be taken as a condition sufficient to establish a "right...secured by the...laws" under Section 1983.

For these reasons, this Court should grant this Petition for Certiorari.

Respectfully submitted,

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